

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>YVONNE M. STILL</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>TEMPORARY EMPLOYMENT CORP.</b>	)	
Respondent	)	Docket No. <b>1,028,944</b>
	)	
AND	)	
	)	
<b>TRANSPORTATION INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier request review of the April 30, 2009 Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on September 9, 2009.

**APPEARANCES**

William L. Phalen of Pittsburg, Kansas, appeared for the claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed Dr. Prostic's second report was part of the evidentiary record.

**ISSUES**

The Administrative Law Judge (ALJ) found claimant sustained a 25.5 percent work disability based upon a 30 percent task loss and a 21 percent wage loss.

Respondent requests review of the following: (1) whether claimant's accidental injury arose out of and in the course of employment; (2) whether claimant gave proper

notice; and, (3) nature and extent of disability. Respondent argues claimant has failed to sustain her burden of proof that her C4-5 neck injury arose out of and in the course of employment or that timely notice was provided.

Claimant argues she is entitled to a 70 percent work disability based upon a 64 percent task loss and a 76 percent wage loss beginning May 17, 2008.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

On January 18, 2006, claimant sustained an injury while working at Print Xcel, a printing company who contracts with respondent for temporary workers. While performing her job claimant had her left hand in a file cabinet to keep her place among the files and she reached down with her right hand to pick up a large file to place it in the cabinet. As she reached for the file she felt a pop in her neck. Claimant experienced immediate pain in her neck and down into her shoulder. The following day she reported the accident to one of respondent's office managers when she picked up her paycheck. She was told to let them know if she did not get better.

When her condition worsened she told respondent and was referred to Mt. Carmel Medical Center on February 3, 2006. She was diagnosed with tennis elbow and prescribed anti-inflammatories and muscle relaxors. She was then referred for occupational and physical therapy. After completion of the therapies, she was provided some lifting restrictions and released to return to work on May 1, 2006, but respondent could not provide a job within her restrictions.

Dr. Edward J. Prostic, board certified orthopedic surgeon, examined and evaluated claimant at her attorney's request. On May 23, 2006, Dr. Prostic took a history from claimant and performed a physical examination. Claimant complained of pain from the left axilla descending towards the thumb and index finger. She had difficulty looking upward and turning her head to either side as well as reaching behind her back. The doctor opined claimant's physical examination was consistent with claimant's complaints of pain as well as the mechanism of her work-related injury. Dr. Prostic diagnosed claimant with an injury to her cervical spine with radiculopathy. The doctor recommended the continued use of anti-inflammatory medicines and if her symptoms continued to worsen then he recommended an MRI of the cervical spine. Based upon the *AMA Guides*, Dr. Prostic rated claimant with an 8 percent permanent partial functional impairment to her body as a whole. Dr. Prostic imposed restrictions against lifting weights greater than 30 pounds occasionally or 15 pounds frequently and that claimant should avoid postures that are awkward for her neck.

On July 19, 2006, the ALJ ordered an independent medical examination by Dr. Jeffery T. MacMillan to evaluate the claimant and to give an opinion as to the nature and extent of claimant's injury, and if needed, what treatment is recommended. Dr. MacMillan, board certified in orthopedic surgery, performed a physical examination on October 9, 2006. The doctor diagnosed claimant as having left shoulder impingement syndrome and recommended oral anti-inflammatory medications, physical therapy and a series of subacromial cortisone injections. At the time of Dr. MacMillan's evaluation, claimant was not at maximum medical improvement and the doctor placed temporary restrictions on the claimant of limited left upper extremity to "occasional" use with the hand at or above shoulder level and placed her in the light-medium physical demand category.

On November 29, 2006, claimant was again evaluated by Dr. MacMillan due to her increased pain in her neck and shoulder. The doctor recommended a cervical MRI and opined that claimant was temporarily totally disabled. The MRI revealed a large central disk herniation at C4-5. On December 19, 2006, an anterior cervical discectomy and fusion at C4-5 was performed on claimant.

On May 24, 2007, at claimant's last examination by Dr. MacMillan, he opined that claimant's left shoulder impingement syndrome had resolved. Based upon the AMA *Guides*<sup>1</sup>, Dr. MacMillan rated claimant with a 20 percent whole person impairment to her cervical spine. Restrictions of light-medium physical demand was placed on claimant. The doctor considered claimant to be at maximum medical improvement. Dr. MacMillan did not rate claimant's left shoulder since it had "resolved". But the doctor had referred claimant to a work hardening program due to the left shoulder. And the work hardening was discontinued because it made claimant's shoulder worse.

Dr. MacMillan testified:

Q. What would your impairment rating be to the left -- is she -- regardless of whether you believe it's work-related or not, was she entitled to any impairment from the left upper extremity complaints that she made on the last visit?

A. She wouldn't get an impairment rating for the complaints of pain alone. If you could document that she had loss of grip strength, then potentially she could get an impairment for that, but I didn't test her grip strength, so I don't know the answer.<sup>2</sup>

Dr. MacMillan reviewed a task list compiled by Mr. Dan Zumalt and concluded that claimant could no longer perform 1 of the 61 non-duplicative tasks for a 2 percent task loss.

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<sup>1</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>2</sup> MacMillan Depo. at 63-64.

On July 20, 2007, claimant was reevaluated by Dr. Prostic. Upon physical examination, claimant still complained of pain on her left side of her neck and left shoulder. The doctor opined that complaints of pain were consistent with the mechanism of injury having occurred on January 18, 2006. Dr. Prostic diagnosed claimant as having postoperative anterior cervical discectomy and fusion, rotator cuff tendinitis and lateral epicondylitis, as well as pronator and carpal tunnel syndrome. The doctor opined claimant has a 15 percent permanent partial impairment to the left upper extremity in addition to Dr. MacMillan's 20 percent rating for claimant's cervical spine impairment. Dr. Prostic placed restrictions on claimant of no repetitious forceful gripping or twisting of the left hand as well as to avoid awkward positions.

Dr. Prostic reviewed the list of claimant's former work tasks prepared by Ms. Karen Terrill and concluded claimant could no longer perform 42 of the 66 tasks for a 64 percent task loss.

Dr. Prostic opined:

It continues to be my opinion that during the course of her employment January 18, 2006, Yvonne M. Still sustained injuries to her neck and left upper extremity. She has been improved by anterior cervical discectomy and fusion. Her arthrodesis is not yet solid. She has been treated for rotator cuff tendinitis and for lateral epicondylitis. She also has evidence of peripheral nerve entrapment at the pronator tunnel and carpal canal. No additional treatment is indicated unless her condition worsens. In addition to the cervical spine rating provided by Dr. MacMillan, the patient has 15% permanent partial impairment of her left upper extremity.<sup>3</sup>

Karen Terrill, a vocational rehabilitation counselor, conducted a personal interview with claimant on August 10, 2007, at the request of claimant's attorney. She prepared a task list of 66 nonduplicative tasks claimant performed in the 15-year period before her injury. Ms. Terrill opined claimant was capable of earning minimum wage for part-time jobs in southeast Kansas.

Dan Zumalt, a vocational rehabilitation consultant, conducted a personal interview with claimant on July 7, 2008, at the request of respondent's attorney. He prepared a task list of 61 nonduplicative tasks claimant performed in the 15-year period before her injury. Mr. Zumalt further opined claimant has the capability to perform work as a general office clerk earning \$381.20 per a week.

Initially, respondent argues that claimant failed to provide timely notice of her work-related accident on January 18, 2006. K.S.A. 44-520 states:

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<sup>3</sup> Prostic Depo. (Sep. 5, 2008), Ex. 2 at 2.

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Claimant testified that she told one of respondent's office managers, the day after her accident, that she had hurt her neck at work the previous day. Christy Clark, one of respondent's branch managers, testified that she was initially notified by claimant on February 3, 2006, regarding her accidental injury. Ms. Clark further testified that she contacted Print Xcel who confirmed that claimant had been injured. Respondent's Policy and Procedure Checklist indicates that if injured claimant was to report the injury to her supervisor at the job site and to respondent.<sup>4</sup> Ms. Clark further testified that other people worked in the office besides her. The ALJ analyzed the evidence in the following fashion:

Nothing in Clark's testimony really contradicted the claimant. Clark seemed unaware of the claimant contacting the office prior to February 3, 2006, but that did not preclude the claimant reporting the incident to someone other than Clark at an earlier time. The claimant's testimony indicated that she reported the injury either the day after it happened or a week and a day after it happened. Her testimony was considered credible and established that she reported the alleged injury within 10 days as required by K.S.A. 44-520.<sup>5</sup>

The Board agrees and affirms.

Respondent next argues that claimant failed to meet her burden of proof that she suffered accidental injury arising out of and in the course of her employment. Respondent's argument seems to focus on the fact that claimant's neck symptoms worsened and she noted that worsening was contemporaneous with her taking down a traction device she had been using. Both doctors attributed claimant's cervical problems to her work-related accident on January 18, 2006. Dr. MacMillan specifically testified that

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<sup>4</sup> Clark Depo., Ex. 4.

<sup>5</sup> ALJ Award (Apr. 30, 2009) at 3.

he was unable to attribute causation for claimant's cervical disk herniation to the incident with the traction device. Dr. Prostic testified that claimant's cervical spine injury was caused by her work-related accident on January 18, 2006. Moreover, claimant testified that as part of her physical therapy she was provided a home traction device for her cervical spine. As noted by the ALJ, even had she suffered additional injury using the device, such injury would be a natural and probable consequence of her work-related injury. The Board affirms the ALJ's determination that claimant suffered accidental injury arising out of and in the course of her employment.

Drs. MacMillan and Prostic provided claimant a 20 percent whole person functional impairment due to her cervical spine injury. In addition, Dr. Prostic provided claimant with a 15 percent functional impairment for her left upper extremity. The Board finds claimant has suffered 27 percent whole person functional impairment.

Because claimant's injuries comprise more than a "scheduled" injury as listed in K.S.A. 44-510d, his entitlement to permanent disability benefits is governed by K.S.A. 2006 Supp. 44-510e(a), which provides, in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

This claim was submitted to the ALJ before the Kansas Supreme Court's *Bergstrom*<sup>6</sup> decision, which abrogated the good faith requirement for work disability. Consequently, the Board's analysis must change to conform to the current state of the law. The test is no longer whether claimant made a good faith effort post-injury to retain her employment with respondent and to find appropriate employment. Instead, the Supreme Court in

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<sup>6</sup> *Bergstrom v. Spears Mfg. Co.*, \_\_ Kan. \_\_, 214 P.3d 676 (2009).

*Bergstrom* said that the factfinder should follow and apply the plain language of the statute. Because claimant's injuries are not covered by the schedule of injuries in K.S.A. 44-510d, her compensation is set out in K.S.A. 44-510e. It provides that once an injured worker is no longer earning 90 percent or more of her preinjury average weekly wage, then the measure of disability is the percentage of task loss averaged with the percentage of wage loss.

In this case, claimant testified that when she was released from treatment at Mt. Carmel on May 1, 2006, she was no longer provided work by respondent. Until she returned to work she suffered a 100 percent wage loss. Claimant did not find a job until June 1, 2007, when she went to work at Parkview Inn earning \$6.50 an hour for 25 hours per week. This would calculate to a 49 percent wage loss. Claimant left this job on October 15, 2007. She was unemployed until May 17, 2008, when she took a part-time job at Papa Murphy's making \$90 a week. This calculates to a 72 percent wage loss. In summation, claimant suffered a 100 percent wage loss from May 1, 2006, through May 31, 2007. From June 1, 2007, through October 15, 2007, claimant suffered a 49 percent wage loss. From October 16, 2007 through May 16, 2008, claimant again suffered a 100 percent wage loss. Finally, from May 17, 2008, claimant suffered a 72 percent wage loss.

The task loss opinions ranged from Dr. MacMillan's 2 percent to Dr. Prostic's 64 percent.<sup>7</sup> The ALJ concluded that neither opinion was more persuasive and averaged the opinions. In this instance the Board agrees and concludes claimant has met her burden of proof to establish that she suffered a 33 percent task loss.

The work disability is determined by averaging the task loss with the wage loss.<sup>8</sup> Accordingly, the claimant has suffered a 66.5 percent work disability (100 percent wage loss, 33 percent task loss) from August 15, 2006, through May 31, 2007. From June 1, 2007, through October 15, 2007, claimant suffered a 41 percent work disability (49 percent wage loss, 33 percent task loss). From October 16, 2007, through May 16, 2008, claimant suffered a 66.5 percent work disability (100 percent wage loss, 33 percent task loss). Finally, from May 17, 2008, claimant suffered a 52.5 percent work disability (72 percent wage loss, 33 percent task loss). Consequently, the Board modifies the ALJ's determination of work disability in accordance with the foregoing.

### **AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated April 30, 2009, is modified as follows:

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<sup>7</sup> Although the ALJ concluded Dr. Prostic's task loss opinion was discredited as noted in the respondent's submission letter, the Board disagrees. Dr. Prostic did not change his opinion regarding claimant's task loss when he was cross-examined.

<sup>8</sup> K.S.A. 44-510e(a).

The claimant is entitled to 29.71 weeks of temporary total disability compensation at the rate of \$210.74 per week or \$6,261.09 followed by 41.29 weeks of permanent partial disability compensation from August 15, 2006 through May 31, 2007, at the rate of \$210.74 per week or \$8,701.45 for a 66.50 percent work disability followed by 19.57 weeks of permanent partial disability compensation from June 1, 2007 through October 15, 2007, at the rate of \$210.74 per week or \$4,124.18 for a 41 percent work disability followed by 30.57 weeks of permanent partial disability compensation from October 16, 2007 through May 16, 2008, at the rate of \$210.74 per week or \$6,442.32 for a 66.50 percent work disability followed by 118.72 weeks of permanent partial disability compensation commencing May 17, 2008, at the rate of \$210.74 per week or \$25,019.05 for a 52.50 percent work disability, making a total award of \$50,548.09.

As of December 31, 2009, there would be due and owing to the claimant 29.71 weeks of temporary total disability compensation at the rate of \$210.74 per week in the sum of \$6,261.09 plus 176.29 weeks of permanent partial disability compensation at the rate of \$210.74 per week in the sum of \$37,151.35 for a total due and owing of \$43,412.44, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$7,135.65 shall be paid at the rate of \$210.74 per week for 33.86 weeks or until further order of the Director.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Terry J. Torline, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge